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Sumner J. Hatch; Robert N. McRae; Attorneys for Appellant;

A. Pratt Kesler; Ronald N. Boyce; Attorneys for Respondent;

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IN THE SUPREME COURT

OCT 14 1964

of the
STATE OF UTAH

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STATE OF UTAH,

Plaintiff-Respondent,

vs.

CYNTHIA HAKKI,

Defendant-Appellant.

Clerk, Supreme Court, Utah

Case No.
10184

BRIEF OF APPELLANT

Appeal from the judgment of the
Third District Court for Salt Lake County
Honorable Merrill C. Faux, Judge

SUMNER J. HATCH
& ROBERT M. McRAE
Attorneys for Appellant
516 Boston Building
Salt Lake City, Utah

A. PRATT KESLER
Attorney General
RONALD N. BOYCE
Chief Assistant Attorney General
Attorneys for Respondent

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IN THE SUPREME COURT

of the

STATE OF UTAH

STATE OF UTAH,)
Plaintiff-Respondent,)
)
vs.)
)
CYNTHIA HAKKI,)
Defendant-Appellant.)

Case No.
10184

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF CASE

The defendant-appellant, Cynthia Hakki, hereinafter called appellant, seeks relief in this Court from the action of the Third District Court Judge Merrill C. Faux' refusal to grant a change of place of trial or a change of judge on a charge of a misdemeanor against the appellant which was originally filed in the District Court at the request of the

Attorney General's Office and the Salt Lake County Attorney's Office.

DISPOSITION IN LOWER COURT

Appellant filed a petition to allow an intermediate appeal following Judge Faux' denial of change of venue or change of judge. The State filed an answering brief and upon hearing of the motion and answer the Supreme Court determined the proper remedy was by Petition for an Extraordinary Writ and allowed time to amend the petition and the State time to answer. Those pleadings have been filed. The matter is before this Court to determine whether the crime charged is properly before the District Court in and for Salt Lake County for a hearing on the merits.

RELIEF SOUGHT ON APPEAL

Appellant seeks an order permanently enjoining the District Court from hearing the misdemeanor matter in the first instance.

STATEMENT OF FACTS

The appellant, on or about May 15, 1964, was charged with a violation of 76-39-5 U.C.A. 1953, as amended in 1963 by the Laws of Utah, chapter 187, §12. The County Attorney's Office ignored the usual procedure in misdemeanor cases and went initially to a judge of the Third District Court, the Honorable Merrill C. Fox, who signed the complaint and made the warrant returnable before himself.

The appellant appeared with counsel Macoy A. McMurray for arraignment and objected to the jurisdiction of the court but was required to enter a plea. Appellant pleaded not guilty and an early trial date was set. Attorney McMurray had to withdraw, as a member of the firm with which he is associated is also a member of the staff of the Salt Lake County Attorney's Office. The appellant acquired new counsel who moved the court for a change of place of trial under 77-57-12

U.C.A. 1953 making a general statement of belief of bias or prejudice. The District Court denied that he was sitting as a justice of the peace or a magistrate and ruled that he was not prejudiced and set the matter for trial, hence this proceeding.

ARGUMENT

POINT I

THE JURISDICTION OF THE COURT WAS NOT PROPERLY INVOKED.

The appellant concedes that under the State Constitution the District Court has original jurisdiction of all crimes, Art. 8, §7, Constitution of Utah. Art. 8, §1 provides for a Supreme Court, District Courts, Justices of the Peace and such other courts inferior to the Supreme Court as may be established by law. The State Legislature has provided additional courts by legislation and it has also provided the ways and means of invoking the jurisdiction of the various

courts. The Legislature, in enacting 77-16-1 U.C.A. 1953, provided as follows:

"All public offenses triable in the District Court, except cases appealed from justice and city courts, must be prosecuted by information or indictment, except as provided in chapter 7 of this title."

Chapter 7 provides for the removal of certain public officers by judicial proceedings.

The crime with which the appellant was charged, 76-39-5, passed by the 1963 Legislature, provides a penalty in 76-39-13 U.C.A. 1953 making a first offense violation of the law punishable by a \$299.00 fine and/or six months in jail, to wit: a misdemeanor.

The laws of Utah make no provision for prosecution of a misdemeanor other than an indictable misdemeanor by information or indictment. This Court, in State v. Telford, 72 Pac. 2d 626, ruled on the present question. In that case a misdemeanor complaint involving the possession of intoxicating liquor was transferred from a city court to the District

Court of Cache County by consent of the parties. Following trial in the District Court and a conviction the defendant appealed contesting the jurisdiction of the court. This Court stated at page 627:

"The District Court should not have proceeded with this case. A tribunal may have jurisdiction of a subject matter but the right to proceed under that jurisdiction may depend on a condition precedent. Put in another way, the court may have jurisdiction of a subject matter, but its jurisdiction should be properly invoked."

and at page 628, paragraph 6 and 8:

"The District Court itself should refuse to proceed if the certificate shows it is not an appeal or that it is not shown that there are no justices of the peace in the county qualified to try the case. It is a case in which mandamus would not lie to make it proceed or take cognizance and in which prohibition might lie to prevent it from taking jurisdiction by a party not consenting to the jurisdiction."

In the case of The State v. Johnson, 114 Pac. 2d 1034, this Court again discussed Art. 8, §7 of the State Constitution with regard to

the question of original trial of a misdemeanor in the District Court. Judge Larson, in the Johnson case, quoting from State v. Ferguson, 83 Utah 375, 28 Pac. 2d 175, 177, states:

"As our law does not sanction the prosecution by information of a misdemeanor which is triable before a justice of the peace, it follows that the District Attorney was not authorized to inform against the defendant for the offense charged in the information and that the District Court was without jurisdiction to try the accused for the offense charged in the information which was filed in this cause . . . "

Further, Art. 8, §9 of the State Constitution makes the District Courts the final appellate courts in all cases triable before justices of the peace in both civil and criminal cases and provides that said appeals shall be final, except in cases involving the validity or constitutionality of a statute. It would appear to be intended by both our Constitution and Legislation to give the defendant a right to a trial de novo in the District Court

following a conviction in a justice of the peace court or a city court. Filing originally in the District Court, in the face of the language of 77-16-1, would deprive the appellant herein of her right to an appeal by trial de novo. Again citing from the Johnson case, *supra*, at page 1037, the court discusses the constitutional meaning of original jurisdiction as contra-distinguished to the right to hear the cause and cites a Florida case, State ex rel v. McClelland, 25 Fla. 88, 5 So. 600, wherein the Florida court held that the purpose and effect of a trial de novo on appeal was the invoking of original as distinguished from appellate jurisdiction. The Florida Constitution contains the identical provision with respect to jurisdiction as does the Utah Constitution. As this Court said in State v. Johnson, *supra*, at page 1039, in discussing the procedural aspects relating to the jurisdiction of the district

courts and the jurisdiction of the justice courts:

"These sections provide for and control the procedure in justice courts to hold the defendant for trial in the district court for indictable offenses and for trial before the justice of the peace for non-indictable misdemeanors. The perusal of these sections reveals a well organized streamlined procedure for the trial of criminal causes so planned as to give symmetry to the whole, prevent overlapping and conflicts, expedite the trial and hearing of criminal matters, and relieve the higher courts of the necessity of occupying their time needed on matters of larger moment on the more trifling or simple actions and yet safeguard all legal rights by assuring the parties full hearing before a court of general jurisdiction and of record.

"This was the evident intent of the framers of the Constitution in writing Art. 8 setting up the judicial department consisting of courts of various grades and powers, trial and appellate, and providing for the ordinary moving of causes from one to another and providing supervisory control of lower courts and tribunals."

It would seem apparent that the Legislature, in enacting 77-16-1, was not flouting the constitutional jurisdiction of the district

court but was setting forth the proper means of invoking such jurisdiction.

POINT 11

JUDGE FAUX SHOULD HAVE TRANSFERRED THE CASE UPON DEMAND AND FILING OF THE AFFIDAVIT TO A JUSTICE OF THE PEACE OR CITY JUDGE AGREED UPON BY THE PARTIES OR IN THE ABSENCE OF AGREEMENT TO THE NEAREST JUSTICE OF THE PEACE OR CITY JUDGE.

The Legislature, in enacting 77-57-1 through 52 U.C.A. 1953, provided the jurisdiction, requisites of pleading, rules, procedures and rights of the defendant in misdemeanor cases as was contemplated by Art. 8 of the State Constitution. 77-57-12 provides for a change of place of trial any time before the trial commences, upon filing an affidavit that the defendant has reason to believe and does believe that he cannot have a fair and impartial trial of the action before the justice about to try the same by reason of bias or prejudice of such justice. The section makes the transfer mandatory

either to a judge agreed upon by the parties or, in the event of no agreement, to the nearest justice in the county to which the objection does not apply. The Legislature also saw fit to make a provision for change of judge in the district court. In chapter 25 of title 77, U.C.A. 1953, 77-25-2 provides:

"Change of Judge--Grounds.--On prosecution by information or indictment, the state or a defendant may apply for a change of judge on the ground that a fair and impartial trial cannot be had by reason of the interest or prejudice of the trial judge."

77-25-3 provides the necessary contents of the application for change of judge. It should be noted that nowhere in the Code of Criminal Procedure is there a statutory basis for challenge of a district court judge on a misdemeanor or other matter triable on a complaint. The apparent and only logical reason for the lack of such provision is that it was never contemplated by either the framers of the Constitution or by the Legis-

latures enacting and amending the various statutory procedures in criminal cases that criminal matters triable by complaint should be tried before the district judges, other than on appeal or on such special matters as are set forth in chapter 7 of title 77. The only constitutional section with regard to disqualification of judges is Art. 8 §13 which sets forth disqualifications arising from consanguinity or affinity or in cases in which he may have been counseled or presided in an inferior court. By both the Utah Constitution and the Constitution of the United States defendants in criminal cases are entitled to be heard by an impartial forum and the Constitution does not restrict the Legislature in setting up procedures by which judges may be disqualified or a change of place of trial may be had. That procedure, in the case of misdemeanors, is set forth in detail in chapter 57 of title 77, and if a

district judge sees fit to act as a magistrate or justice of the peace in signing misdemeanor complaints and/or putting himself into a position to try misdemeanor cases, which in our system of courts should arise in and be tried in at justice or citycourt level, he should be bound by those procedures.

Not only in criminal proceedings, but in civil proceedings have the courts and legislative bodies recognized the right to an impartial judge or a forum free from bias or prejudice. As a result, Rules of Civil Procedure 63A and B, adopted by this Court and approved by the Legislature, provide for change of judge in a civil action. This Court, as recently as 1962, in the case of Anderson v. Anderson, 13 Utah 2d 36, 300 Pac. 2d 264, has held that after filing of an affidavit against the judge that any further action of him in the case would be ineffective against the affiant and that he cannot proceed

to hear the issue, citing Rules of Civil Procedure, Rule 63B. It cannot be denied that a change of judge in either civil or criminal action can and should be had by following the proper procedure, and Judge Faux should have removed himself from the case after filing of the affidavit.

CONCLUSION

The District Judge, against whom relief is sought in this proceeding, took it upon himself to sign a complaint in the above matter, making the warrant returnable before him, and after insisting that a plea be entered, set the matter for early trial ahead of the large portion of felony cases on the district court criminal calendar.

77-20-3 U.C.A. 1953 provides as follows:

"Order of Disposing of Issues.
The issues on the calendar must be disposed of in the following order unless for good cause the court shall direct an action to be tried out of its order:
(1) prosecutions for felony when the

defendant is in custody; (2) prosecutions for misdemeanor when the defendant is in custody; (3) prosecutions for felony when the defendant is on bail; (4) prosecutions for misdemeanor when the defendant is on bail."

The crime with which the appellant was charged comes under the last, or No. 4 category, and it was set for trial ahead of the bulk of the 1, 2 and 3 categories then on the District Court calendar with no expression of cause. This fact, together with the signing of the complaint in the face of 77-16-1 almost indicates a prejudice in itself.

It is respectfully requested that the Honorable Merrill C. Faax be permanently enjoined from proceeding further with the case.

Respectfully submitted,

HATCH & McRAE

By

Sumner J. Hatch

Attorneys for Defendant-
Appellant